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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

United States of America,

Plaintiff,

vs.

Donald Day, Jr.,

Defendant

Case No. CR-23-8132-PCT-JJT
**MOTION TO SEVER COUNTS 3 &
4**

In response to the Court's Order, Dkt. 111, Mr. Day respectfully moves to sever Counts 3 and 4 from the upcoming jury trial, presently set for April 22, 2025. As explained in more depth below, severance provides clarity on the constitutionality of the charges Mr. Day faces; it guards against unwarranted prejudice; and it will not unduly interfere with judicial economy. Mr. Day respectfully requests the Court allow this case to proceed to trial on Counts 1, 2, and 5, as-scheduled, beginning April 22, 2025.

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Severance of Counts 3 and 4—the two firearm related counts—offers several practical and procedural benefits:

1 **First**, severance allows additional time for the Ninth Circuit to provide
2 clarity on the constitutionality of the firearm charges in this case. The law
3 governing firearm prohibitions in this Circuit—particularly for individuals with
4 prior felony convictions—remains in considerable flux. As the Court knows,
5 *United States v. Duarte*, No. 22-50048 —a case presenting whether the lifetime
6 ban on possession of firearms worked by 18 U.S.C. § 922(g)(1) is consistent with
7 the Second Amendment—remains pending, en banc. The Ninth Circuit’s decision
8 in *Duarte* will likely provide guidance for, if not wholly control, this Court’s
9 resolution of Mr. Day’s constitutional challenges to the firearm counts in this case.

10 In August 2024, Mr. Day requested the only continuance he has sought in
11 this case. *See Motion to Continue Trial and Pretrial Motion Deadline;*
12 *Alternatively Motion to Bifurcate Trial* (Dkt. 85). That continuance was requested
13 to provide the Ninth Circuit with “the opportunity to clarify the law as it applies to
14 this case.” *Id.* at 2. At the time, Mr. Day suggested that “a continuance of six months
15 should provide an adequate window for the Ninth Circuit to decide the case.” *Id.*

16 That belief, however, appears to have been optimistic. *Duarte* was not
17 argued until December; and, as recently as last month, the parties continue to
18 submit supplemental briefing. *See Citation of Supplemental Authorities, filed in*
19 *United States v. Duarte*, 22-50048 (Dkts. 123 & 124).

20 Although a continuance was reasonable at the time, Mr. Day believes the
21 alternative remedy he sought in August—severance—is now warranted.

22 **Second**, severance allows the government the opportunity to clarify its
23 litigation position in this, and other, firearm-related cases. In an Executive Order
24 issued on February 7, 2025, President Trump ordered the Attorney General to
25 review “[t]he positions taken by the United States in any and all ongoing and
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1 potential litigation that affects or could affect the ability of Americans to exercise
 2 their Second Amendment rights” within 30 days. *See* E.O. 14206, *Protecting*
 3 *Second Amendment Rights* (Feb. 7, 2025)¹. Following that review, the Attorney
 4 General was ordered to present a “proposed plan of action to the President . . . to
 5 protect the Second Amendment rights of all Americans.” *Id.* Following submission
 6 of the plan, the Attorney General is to “establish a process for implementation” of
 7 the plan—though no timetable is provided. That process, however, will likely take
 8 time. While the government engages in that process, Mr. Day respectfully requests
 9 the opportunity to resolve the remaining charges against him. This, too, supports
 10 severance.

11 ***Third***, severance of Counts 3 and 4 avoids unwarranted prejudice to Mr.
 12 Day. *See* Fed. R. Crim. P. 14(a) (providing court may “order separate trials of
 13 counts” where a “consolidation for trial appears to prejudice a defendant”). The
 14 charges in this case share little factual connection. And consolidating the counts for
 15 trial creates a real risk of prejudice to Mr. Day. This is especially true where, as
 16 here, Mr. Day is accused of possessing a firearm after a prior felony conviction.
 17 “All of the Circuit Courts seem to agree that trying a felon in possession count
 18 together with other felony charges creates a very dangerous situation,” risking
 19 serious prejudice to the defendant. *United States v. Nguyen*, 88 F.3d 812, 815 (9th
 20 Cir. 1996). This is so “because the jury might improperly consider the evidence of
 21 a prior conviction when deliberating about the other felony charges,” and convict
 22 the defendant “because he is a ‘bad guy’” or “because ‘he committed a crime before
 23 and probably did this one too.’” *Id.*; *see also United States v. Richardson*, 161 F.3d
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 26 ¹ Available at [https://www.whitehouse.gov/presidential-](https://www.whitehouse.gov/presidential-actions/2025/02/protecting-second-amendment-rights/)
 27 [actions/2025/02/protecting-second-amendment-rights/](https://www.whitehouse.gov/presidential-actions/2025/02/protecting-second-amendment-rights/)

1 728 (D.C. Cir. 1998) (recognizing, in misjoined trial for threats and weapons trial,
2 that “the jury heard irrelevant and clearly prejudicial evidence in connection with
3 the threats charge at the time it was determining appellant’s guilt on the weapons
4 charges”). Severance guards against this risk and ensures Mr. Day will receive a
5 fair trial.

6 ***Fourth***, there is no clear basis for joinder of the offenses in the first place.
7 Under Rule 8(a), offenses may be joined if they “are of the same or similar
8 character;” are “based on the same act or transaction;” or “are connected with or
9 constitute parts of a common scheme or plan.” In Mr. Day’s case, it is arguable that
10 Counts 1, 2, and 5 (the threat counts) and Counts 3 and 4 (the firearms counts) are
11 of a “similar character.” Fed. R. Crim. P. 8(a). But there is no comparable
12 connection between the threat and firearm counts: they are dissimilar, they are not
13 based on the same act or transaction; and they are not part of a common scheme or
14 plan. *See id.* Although Rule 8 is generally construed liberally, the rule is “not
15 infinitely malleable: it cannot be stretched to cover offenses, like those here, which
16 are discrete and dissimilar and which do not constitute parts of a common scheme
17 or plan.” *Richardson*, 161 F.3d at 733. Severance, then, ensures compliance with
18 Rule 8.
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20 ***Finally***, judicial economy is not substantially promoted through a single
21 trial. The evidence supporting each count is, largely, distinct. That is true even for
22 the counts that are of a similar character. For the threat counts, for example: one
23 was allegedly made in a video Mr. Day uploaded to YouTube; another was
24 allegedly posted in a comment on another website, BitChute; and a third was
25 allegedly made in person, when Mr. Day was arrested for these offenses. Each of
26 the threat counts are separated in time, and each count involved a different alleged
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1 victim. The firearm counts share some similarities: each requires evidence of Mr.
2 Day's possession of a firearm or ammunition. Count 3, of course, requires proof of
3 Mr. Day's alleged prior felony convictions; and for Count 4, the government must
4 prove Mr. Day's knowledge of the firearm's specific characteristics and that the
5 firearm was unregistered. *See United States v. Montoya-Gaxiola*, 796 F.3d 1118,
6 1122 (9th Cir. 2015). Overall, with little factual overlap and little connection
7 between the counts, little efficiency is achieved through a single trial. It will only
8 result in a *longer* trial. And a longer trial is especially burdensome here, where
9 jurors will be forced to travel long distances to serve on the jury.

10 * * *

11 For all these reasons, Mr. Day respectfully requests that the Court sever
12 Counts 3 and 4, and allow this case to proceed to trial on Counts 1, 2, and 5, as-
13 scheduled, beginning April 22, 2025.

14 Excludable delay under 18 U.S.C. § 3161(h)(7)(B)(i) and (ii) may
15 result from this motion or from an order based thereon.

16 Respectfully submitted: February 25, 2025.

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19 Federal Public Defender

20 s/Mark Rumold
21 MARK RUMOLD
22 Asst. Federal Public Defender
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